



46TH ANNUAL INDIANA CONSORTIUM

of

STATE AND LOCAL HUMAN RIGHTS AGENCIES CONFERENCE

PRESENTED *by:*





EEOC'S LEGAL UPDATES

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OVERVIEW

- Mission and jurisdiction of the EEOC.
- Supreme Court and 7th Circuit Decisions
- Select Task Force Report and Statistics.
- EEOC's litigation of cases FY 2017-2018
- Q&A



MISSION OF THE EEOC

- Primary federal agency that deals with combatting employment discrimination.
- The EEOC receives, reviews, investigates and processes charges of employment discrimination and files discrimination suits in the private sector.
- Our guidance and information helps educate both employers and employees about their rights and responsibilities under the laws we enforce.



JURISDICTION

- Title VII of the Civil Rights Act – prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.
- Pregnancy Discrimination Act – requires employers to treat pregnancy and pregnancy related medical conditions, as any other medical disability with respect to terms and conditions of employment, including health benefits.



JURISDICTION

- Rehabilitation Act of 1973 – prohibits discrimination on the basis of disability in the federal government.
- Equal Pay Provisions of the Fair Labor Standards Act – prohibits sex discrimination in the payment of wages to men and women performing substantially equal work in the same establishment.
- Age Discrimination in Employment Act of 1967 (ADEA) – protects workers 40 and older from discrimination in hiring, discharge, pay, promotions, fringe benefits, and other aspects of employment.



JURISDICTION

- Title I and Title V of the Americans with Disabilities Act of 1990 (ADA) – prohibits discrimination against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, fringe benefits, job training, and other terms, conditions, and privileges of employment.
- The Genetic Information Nondiscrimination Act (GINA) – protects against discrimination based on genetic information when it comes to health insurance and employment. The law went into effect on November 21, 2009.



SUPREME COURT

- October 2019 – the Supreme Court will hear 3 important cases and will consider whether the term “because of ... sex” includes because of sexual orientation or transgender status.
- Determinations should be made before January 2020
 - *Bostock v. Clayton County, Georgia*
 - *Altitude Express Inc. v. Zarda*
 - *R.G. and G.R. Harris Funeral Homes Inc. v. EEOC*



SEVENTH CIRCUIT

- Mostly nothing groundbreaking
- *Kleber v. CareFusionCorp.*, 914 F.3d 480 (7th Cir. 2019)
- Several cases showing the Circuit Court is looking hard at harassment cases
- ADA matters require an individualized assessment



SEVENTH CIRCUIT

Eyiwuawi v. Cook County, 741 Fed. Appx. 345 (7th Cir. 2018)

- Employee: you fired me because I engaged in the protected activity of filing a charge of discrimination.
- Employer: no, we fired you because we determined after an investigation that you sexually harassed another one of our employees.
- Court: it is lawful for an employer to fire an employee who has violated the anti-harassment policy.



SEVENTH CIRCUIT

EEOC v. Costco, 903 F.3d 618 (7th Cir. 2018)

- Customer engaged in unwelcome sexual conduct, advances, or requests
- Comments: where do you live, who's your boyfriend, who was that man you were talking to, you changed your makeup, you look exotic, I can't tell whether your 17 or 27 because parts of your body look younger and other parts look older, will you go out on a date with me
- Contact: used a shopping cart to bump into her, touched her cheek and noted darkness under her eye, touched her wrist and noted veins and slowly healing wound, tried to hug her
- Conduct: watching her work, filming her, attempting to give her his business card and telephone number



SEVENTH CIRCUIT

EEOC v. Costco (cont.)

Because of sex

- Staring, comments about body, exotic, tried to hug, date requests
- No evidence that he treated any man the way he treated the female victim
- And harassment is not limited to acts of sexual desire



SEVENTH CIRCUIT

EEOC v. Costco (cont.)

Severe or pervasive, subjectively and objectively

- No dispute the victim found the conduct severe or pervasive
- Objectively, customer's comments and contact took place in the context of stalking
- Pervasive—multiple encounters over a 13-month period
- Severe—customer's behavior continued after store management told him to stay away from her, after he told the police and store manager would leave her alone, and after he knew that his behavior scared the victim



SEVENTH CIRCUIT

EEOC v. Costco (cont.)

Basis for employer liability

An employer is responsible for its own negligence if it is reckless in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises under his control.

- Initial response—confronting customer—was appropriate
- But when the behavior continued, and victim continued to complain to multiple management officials, employer's effort was insufficient
- Employer's ultimate decision to ban customer from the store came after working environment became unbearable



SEVENTH CIRCUIT

EEOC v. Costco (cont.)

Backpay is recoverable when hostile work environment compels victim to take unpaid leave.



SEVENTH CIRCUIT

Frey v. Hotel Coleman, 903 F.3d 671 (7th Cir. 2018)

- Hotel owned by one entity—Hotel Coleman, Inc.—and operated by another, Vaughn Hospitality, Inc.
- Hotel Coleman was an employer: it signed and funded employee paychecks, issued W-2s, and owned the premises.
- Was Vaughn Hospitality also an employer?



SEVENTH CIRCUIT

Frey v. Hotel Coleman (cont.)

Vaughn Hospitality

- Owned by Michael Vaughn and his wife.
- Has an agreement with Hotel Coleman that Vaughn Hospitality is responsible for hiring, supervising, directing, determining the terms and conditions of, and discharging Hotel Coleman's employees.



SEVENTH CIRCUIT

Frey v. Hotel Coleman (cont.)

- Michael Vaughn hired Plaintiff Frey, then proceeded to sexually harass her.
- Frey complained to her manager, her manager told Vaughn, Vaughn laughed it off and continued.
- When Frey became pregnant, Vaughn reduced her hours, designed not to promote her as he had promised, assigned her to the night shift without the normal pay differential, refused to consider her for another position, and made additional harassing comments.
- After Frey filed a charge of discrimination, Vaughn fired her.



SEVENTH CIRCUIT

Frey v. Hotel Coleman (cont.)

- District court said Vaughn Hospitality was not an employer.
- Circuit Court: applying the correct, economic realities test, Vaughn Hospitality might be an employer:
 1. Control over the worker
 2. Kind of occupation and nature of skill
 3. Responsibility for costs of operation
 4. Method and form of payment and benefits
 5. Length of job commitment and/or expectations



SEVENTH CIRCUIT

Smith v. Rosebud Farms, Inc., 898 F.3d 747 (7th Cir. 2018)

- Butcher shop in a grocery store
- Mixed-gender workplace, but Smith and the employees and supervisor committing the complained-of acts were all male
- Sex-based banter and contact
- Smith filed a charge of discrimination
- Sex-based banter and contact ended



SEVENTH CIRCUIT

Smith v. Rosebud Farms, Inc. (cont.)

- Instead Smith's colleagues threatened him with butcher knives, slashed his car tires, and broke his windshield
- Because Smith's colleagues did not engage in similar conduct toward women, the evidence supported the conclusion that Smith's colleagues created a hostile work environment for Smith because of his sex



SEVENTH CIRCUIT

Gates v. Bd. of Educ. of Chi., 916 F.3d 631 (7th Cir. 2019)

- Gates's supervisor called him the N-word twice and threatened to discipline his "black a__" once, over a six-month period.
- The "hellish workplace" standard is no longer.
- These comments by a supervisor are enough to get a claim of a racially hostile work environment to the jury.



SEVENTH CIRCUIT

Donley v. Stryker Sales Corp., 906 F.3d 635 (7th Cir. 2018)

- Donley complained to HR that a sales manager had sexually harassed Donley's co-worker.
- Stryker investigated and terminated the sales manager.
- Stryker then began investigating Donley for a photograph Donley took of a vendor's CEO during a team meeting in Vail six weeks before the sales manager was terminated.



SEVENTH CIRCUIT

Donley v. Stryker Sales Corp. (cont.)

- Conflicting evidence of whether Stryker knew about the photograph before Donley complained to Stryker about the harassing manager, so it's for the jury to decide whether Donley's termination was in retaliation.
- Court rejected Donley's attempt to show disparate treatment for violating company policies because her comparator—the fired sales manager—was not situated similarly enough.



SEVENTH CIRCUIT

Silva v. Wisconsin, 917 F.3d 546 (7th Cir. 2019)

Corrections officer's race and national origin discrimination claim is for the jury where correctional officer provided evidence that a comparator—another correctional officer not of the same race or national origin—engaged in the same actions—use of force and unreliable statements about the use of force—but only the plaintiff was terminated.



SEVENTH CIRCUIT

Sansone v. Brennan, 917 F.3d 975 (7th Cir. 2019)

- Sansone, an individual with a disability, needs a wheelchair and uses a mechanical lift to exit and enter his vehicle.
- The few designated handicap parking spaces wide enough for the lift at the Post Office where he works are frequently in use.
- For many years, he parked in a space reserved for him by the loading dock that gave him enough space to operate the mechanical lift.



SEVENTH CIRCUIT

Sansone v. Brennan (cont.)

- But manager became concerned using the space was unsafe: higher traffic on the dock, trucks and forklifts going in and out of dock, and OSHA had issued a fine for a number of hazards.
- So manager said, don't park there anymore. Use one of the handicap spaces or my reserved space (in the back of the building).
- Request for reasonable accommodation: a parking space that will meet Sansone's needs.
- Response to request: we're working on it



SEVENTH CIRCUIT

Sansone v. Brennan (cont.)

- Supervisor: until they get it worked out keep parking where you have been parking for 15 years
- Manager: move van or it will be towed
- Sansone: can't deal with stress; I'm retiring and I'll sue



SEVENTH CIRCUIT

Sansone v. Brennan (cont.)

- Claim: failure to accommodate
 1. Qualified individual with a disability
 2. Employer aware of disability (or should have been aware)
 3. Employer failed to provide reasonable accommodation
- Jury: found for Sansone
- Judgment: \$828,774
- Jury's finding on failure to accommodate claim affirmed by Seventh Circuit



SEVENTH CIRCUIT

Rowlands v. UPS, 901 F.3d 792 (7th Cir. 2018)

- As a result of a workplace injury, Rowlands had knee surgery.
- When she returned to work, without restriction, she requested accommodations:
 - Use a first-floor restroom so she didn't have to climb the stairs (denied, first-floor restroom is only for managers)
 - Replace a long cord on a piece of work equipment with a shorter cord so it wasn't a trip hazard (denied, and she tripped, causing injury)



SEVENTH CIRCUIT

Rowlands v. UPS (cont.)

- Rowlands was not allowed to move her car, like other employees were, at shift change when many colleagues left, so she had to walk to a remote part of an isolated, dimly lit parking lot when her shift was over.
- Rowlands was terminated after a colleague complained he was threatened by Rowlands with the taser she carried for personal protection.



SEVENTH CIRCUIT

Rowlands v. UPS (cont.)

- Pretext?
 - Idea that colleague was threatened by Rowlands's possession of a taser described by colleagues as "truly, truly laughable," "an outright lie," "just so obviously ridiculous," "truly ironic"
 - Terminating manager described Rowlands as "a constant pain in my butt" and "that management has been on me continually about this."



SEVENTH CIRCUIT

Rowlands v. UPS (cont.)

Failure to Accommodate

- Is Rowlands a qualified individual with a disability?
 - Her doctor released Rowlands to work without restrictions, but Rowlands testified her knees substantially limited her ability to walk, stand, squat, and kneel.
 - “These claims are sufficient to support Rowlands’ claim that she has a disability.”



SEVENTH CIRCUIT

Rowlands v. UPS (cont.)

- Was UPS aware of her disability? Yes, requesting accommodations for her knees were sufficient to trigger UPS's obligation to engage in the interactive process.
- Did UPS fail to accommodate Rowlands? Yes. It did not allow her to use the "manager's restroom" and failed to shorten the cord.



SEVENTH CIRCUIT

Rowlands v. UPS (cont.)

Retaliation

- Could the evidence permit a reasonable factfinder to conclude that Rowland's requests for accommodations caused her termination?
- Yes, because there is sufficient evidence that the explanation offered was pretext:
 - Laughable, lie, ridiculous
 - Constant pain in firing official's butt

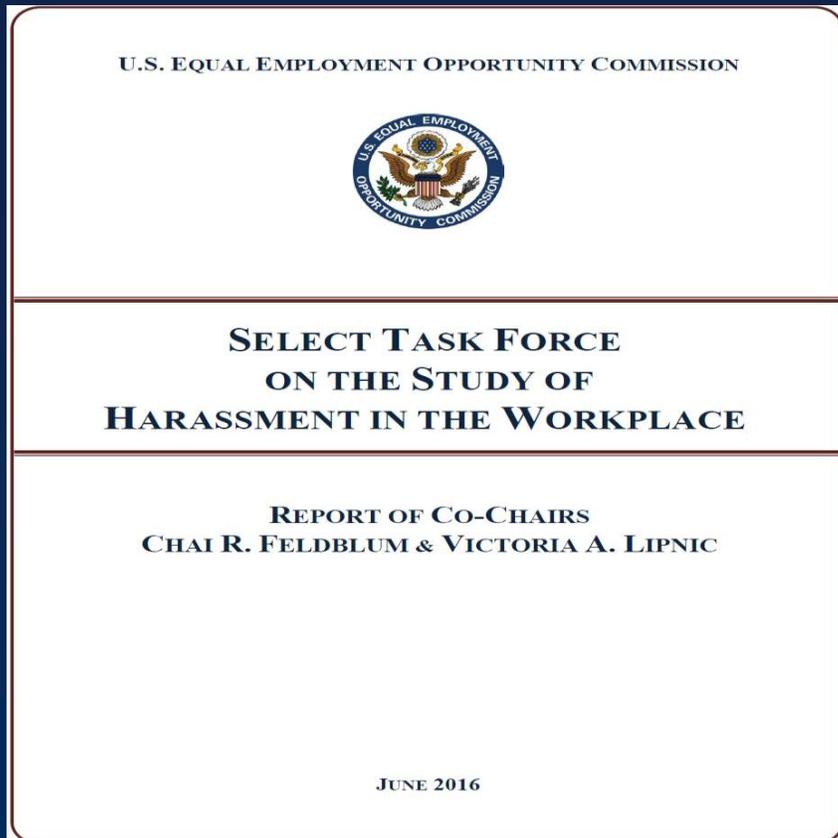


A BRIEF UPDATE ON LEAVE

- Terminating an employee because he has asked to return to work following leave is not the same as terminating the employee because he is unable to work. *EEOC v. S&C Elec. Co.*, 303 F. Supp. 3d 687 (N.D. Ill. 2018).
- Where leave is granted to non-disabled employees, failure to grant leave as a reasonable accommodation to an otherwise-qualified individual with a disability may violate the ADA. *EEOC v. Midwest Gaming & Entm't, LLC*, 2017 U.S. Dist. LEXIS 88367 (N.D. Ill. 2018).
- Where an employer extends a twelve-week leave and provides positive performance evaluation, a six-week leave may be reasonable. *Wileman v. Sch. Dist. Of Janesville*, 2018 U.S. Dist. LEXIS 4495 (W.D. Wisc. 2018).



TASK FORCE AND STATISTICS



- Since the report was filed, the EEOC has noticed an increase in the reporting and in the charges filed, as well as in the amount recovered for charging parties.



TASK FORCE AND STATISTICS

- FY2017

- Nationwide: 84,254 charges
- Charges alleging sex discrimination: 25,605
- Charges alleging sexual harassment: 6,696
- \$355.6 million in monetary relief for victims of discrimination
- \$46.3 million was for victims of sexual harassment

- FY2018

- Nationwide: 76,418 charges
- Charges alleging sex discrimination: 13,055
- Charges alleging sexual harassment: 7,609
- \$505 million in monetary relief for victims of discrimination
- \$70 million was for victims of sexual harassment



Some cases Litigated by the EEOC FY 2017-2018

02/15/17 – CHICAGO – Ford Motor Company has agreed to pay up to \$10.125 million to settle sex and race harassment for a group of individuals which was investigated by the U.S. Equal Employment Opportunity Commission (EEOC) at two Ford plants.

01/08/18 – INDIANAPOLIS – Louisville, KY based restaurant chain Indi's Fast Food Restaurant, Inc. (Indi's) will pay \$340,000 to 15 female former employees, some of whom were teenagers while employed by Indi's, and implement other relief to settle a federal lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).



Some cases Litigated by the EEOC FY 2017-2018

07/19/18 – ST. LOUIS – 2103 and 2098 Restaurant Group, LLC., operators of 2 IHOP franchise restaurants in Southern Illinois, will pay \$975 thousand to 18 claimants to settle sexual harassment and retaliation claims. The EEOC also obtained additional relief to settle the claim.

07/24/18 – LOS ANGELES – Bornt & Sons d/b/a Bornt Family Farms will pay \$300,000 in compensatory damages to settle sexual harassment and retaliation claims in a case involving farmworkers. The EEOC also obtained additional relief.



Some cases Litigated by the EEOC FY 2017-2018

07/31/18 – LOS ANGELES – Alorica, Inc. has agreed to pay up to \$3.5 million to settle sexual harassment and retaliation claims for a group of individuals working in call centers and implement other relief to settle a federal lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

QUESTIONS?

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